

FILED
DISTRICT COURT OF GUAM

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Clerk of Court

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IN THE UNITED STATES DISTRICT COURT

FOR THE TERRITORY OF GUAM

CASSANDRA CHAU TRUONG,
Administratrix of the Estate of ROLAND
ANTHONY BOUDREAU, deceased,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Case No.: 06-00022

TRIAL BRIEF OF THE UNITED STATES

The United States, by and through its attorneys in the above entitled matter, hereby submits this trial brief.

Plaintiff is alleging, under the Federal Tort Claims Act, that the negligence of an employee of the United States caused or contributed to the death of her husband. In fact, the unfortunate accident and the death were caused by the negligence of the Plaintiff and the deceased, Roland Boudreau.

There is no proximate cause between any acts of federal employees of the United States and the accidental death.

1 **I. FACTUAL SUMMARY**

2 Just after 7:00 p.m., on April 2, 2005, Cassandra Truong, Plaintiff, was driving a golf cart
3 slowly across a field on Navy property at Polaris Point with her husband hanging on to the back
4 of the cart on a platform designed to carry golf clubs, not people. Both Plaintiff and her husband
5 had been drinking during the day. Someone alerted her that he was no longer on the back. She
6 stopped her cart and found him several feet back lying on a concrete area that she had just driven
7 over. He was transported to the hospital and died the following day.

8 Plaintiff was at Polaris Point as part of a team of people from Ambros, Inc. (hereinafter
9 “Ambros”). Ambros held a concert there on the Navy property that day (for a performance of a
10 musical group, “Three Doors Down”). Plaintiff was the Marketing Manager for Ambros and, as
11 part of her promotional duties, she had set up a “VIP tent”. She provided her husband, Roland
12 Boudreau, with a VIP pass and sent him to a special VIP party at the Hard Rock Café, which
13 included unlimited, free beer prior to the concert and a bus drive to the concert and back. After
14 the party at Hard Rock, the bus brought Boudreau to the concert at approximately 1:30 p.m.
15 Plaintiff’s VIP tent included free beer for the VIPs. Boudreau was in the VIP tent until just after
16 7:00 pm, when Plaintiff placed him on the back of the cart and drove across the field.

17 Initially, after the accident, Plaintiff submitted a sworn statement to Naval investigators
18 that her husband had jumped off the back of the cart to retrieve a fallen zori (sandal), lost his
19 balance, and ended up face down on the ground. The hospital, as part of his emergency medical
20 care, determined that his Blood Alcohol Content (BAC) was .2258, or approximately three times
21 the legal limit.

1 Later, Plaintiff claimed that a "hole" in the concrete slab had caused the decedent to be
2 thrown off the cart. Her previously sworn statement to Naval investigators contained no such
3 complaint.

4 Plaintiff then sued the United States in this Court claiming that the Navy's negligence
5 was the proximate cause of the accident. In depositions, she denied her own negligence and
6 stated that the Navy was negligent in allowing her, an avid golfer with admitted experience
7 driving golf carts, to operate the cart without training and for having an irregular surface that
8 included what she described as a "hole".

9 The field where Plaintiff drove the golf cart is regularly inspected and maintained. Prior
10 to the concert event, the field was inspected by the Navy and Plaintiff's employer, Ambros. Any
11 irregularities of significance in the field were marked by cones. Metal trash drums were also
12 placed in any significant area of indentation. No "hazards" were seen or known to the Navy. In
13 fact, the field has been used for community activities for many years, before and after the
14 accident, and the Navy has never received a report of a hazard or injury on the field. The
15 concrete slab area had irregularities in the concrete, such as embedded tracks and aging concrete
16 with areas of cracks and grass, but nothing that would be considered a hazardous condition. The
17 slab area was inspected by an employee of Ambros just after the accident. He found no
18 dangerous conditions; certainly nothing that would pose a danger to a slow moving golf cart.

19 During a site visit in the discovery period in this case, the Plaintiff identified an area in
20 the concrete that was indented and had grass growing in it as the "hole" she says caused the
21 decedent to fall from the golf cart. Plaintiff claims she was not going full speed in the cart. An
22 Accident Reconstruction Engineer with a Ph.D., Dr. Frank Perez, tested the identified "hole" at
23 different speeds, including full speed, and at different angles, to determine, by instrument, if
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1 there were forces that would cause a person to fall. None exist. The accident reconstruction
2 engineer found no hazards in the identified area that would cause a person with normal faculties
3 to fall.

4 The United States has further consulted a medical doctor with an expert background in
5 alcohol and its effects, Dr. Shieh. He has further confirmed that a person at .2258 BAC, such as
6 the deceased, would have been severely intoxicated and lacking normal functioning faculties.

7 The golf cart that the U.S. Navy allowed Plaintiff's employer to use for transporting
8 items from a parking lot/staging area to the VIP tents included a sign that prohibited more
9 passengers than would fit in the seats. The sign, permanently embedded on the dashboard, in her
10 line of sight as she drove the cart all day, stated, "DO NOT start vehicle until all occupants (two
11 (2) per seat maximum) are seated" (Capitalization in original). It also stated, "DO NOT operate
12 while under the influence of alcohol..." In addition, Plaintiff's employer had someone who
13 specifically told her not to have people hanging on to the back of the cart.

14 Golf carts are not inherently dangerous; they are only dangerous when misused. The
15 grounds were not dangerous. The unfortunate accidental death was proximately caused by the
16 negligent actions of the Plaintiff and Mr. Boudreau and not any alleged act or omission by an
17 employee of the United States.

18 **II. THE FEDERAL TORT CLAIMS ACT**

19 Under the doctrine of sovereign immunity, courts may not entertain suits against the
20 United States without its consent. Consequently the United States is liable in tort only to the
21 extent it waives its sovereign immunity. The Federal Torts Claims Act, 28 U.S.C. §§ 1346 (b),
22 2671 to 2680 ("FTCA"), is the exclusive remedy for persons seeking damages from the United
23 States for personal injuries. The FTCA is only a limited waiver of sovereign immunity. It
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1 makes the United States liable to the same extent as a private individual *for certain torts of*
2 *federal employees acting within the scope of their employment.* 28 U.S.C § 1346 (b). As a
3 result, there must be an actual negligent act or omission on the part of a federal employee.
4 Inferences and strict liability are not allowed. Laird v. Nelms, 406 U.S. 797 (1972).

5 Waivers of sovereign immunity, such as the FTCA, are strictly construed in favor of the
6 sovereign. Owen v. United States, 935 F.2d 734 (5th Cir. 1991). The burden of proving that the
7 government's negligence was the proximate cause of the injury generally falls on the plaintiff.
8 Cualey v. United States, 242 F. Supp. 866 (E.D. N.C. 1965). The government's negligence is
9 not the proximate cause if the plaintiff's injury was not foreseeable. Garza v. United States, 809
10 F.2d 1170 (5th Cir. 1987). Similarly, the government's negligence may be superseded by a third
11 party's act that constitutes an intervening cause of the plaintiff's injury. Aikona v. United States,
12 732 F. Supp. 1064 (D. Haw. 1990), rev'd, 938 F.2d 158 (9th Cir. 1999).

13 This creates a barrier for the Plaintiff in this case. Placing her severely inebriated
14 husband on the back of a golf cart, with no safety restraints, was a negligent act. Mr. Boudreu's
15 inebriation to the point of .2258 was also a negligent act. These acts, along with Plaintiff's
16 decision to drive the cart after consuming alcohol, were the proximate cause of the accident. It is
17 Plaintiff's burden to show that these acts were not the sole causes of the accidental death.

18 **III. NO LIABILITY DUE TO PROPERTY OWNERSHIP**

19 The United States, under the FTCA, cannot be held liable for the accident simply because
20 it owns the land upon which the accident occurred. This would be akin to holding the United
21 States strictly liable. Such a strict liability theory against the United States is not permitted.
22 Dennis v. United States, Memorandum Opinion, (Civil Case No. 88-42 D. Ct. Guam 1990)
23 (affirmed on appeal by the Ninth Circuit in an unpublished disposition), attached as Exhibit A.
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1 In Dennis, the plaintiff had stepped into a hole (where a pole had previously been) on the Naval
2 Hospital property on Guam and snapped her leg at the knee, requiring knee replacement surgery.
3 The United States was found to be not liable under the FTCA because it had conducted
4 reasonable inspections of the land and had not found the hazard. The Guam District Court
5 stated, "Indeed, the United States did conduct reasonable inspections of the area in question and
6 did not discover..." the hole. Id. at page 8.

7 Neither could a private landowner on Guam be held liable in such circumstances. In
8 Guerrero v. McDonald's Int'l Prop. Co., Ltd., 2006 Guam 2, ¶ 26-27, the plaintiff had fallen
9 inside a McDonald's. The plaintiff alleged that she entered the restaurant, stepped on something
10 on the floor and fell, injuring herself. The court found that "no inference of negligence arises
11 based simply upon proof of a fall upon the owner's floor." The plaintiff must present evidence
12 that the defendant "had actual or constructive knowledge of the transitory hazard and failed to
13 exercise reasonable care to eliminate it." Id.

14 The Court will hear evidence that the Navy regularly maintains and inspects the grounds
15 where the accident occurred. Literally thousands of people use the field for events that are either
16 sponsored by the military, such as Fourth of July celebrations, or sponsored by entities in the
17 community, such as the "Three Doors Down" concert that took place just before Mr. Boudreau's
18 accident. There had never been an accident at that location previously. There has been no
19 accident since.

20 The Navy, along with Ambros, inspected the field the day before the concert event.
21 Where the field had any irregular areas or anything of note, cones and heavy metal trash drums
22 were placed there to draw attention. The Navy and Ambros found no hazards where Plaintiff
23 now claims the accident occurred.

1 Immediately after the accident, another employee at Ambros, who worked with the
2 Plaintiff on the event, searched the area where the accident occurred. He organized a methodical
3 inspection of the area and searched the area with another employee. They were looking for a cell
4 phone the decedent had purportedly dropped, and they were curious as to what may have caused
5 the accident. They searched the concrete pad where the decedent fell. They found no hazards.
6 The irregularities, cracks with grass, etc., on the concrete pad, were not such that they constituted
7 a hazard.

8 The United States had an Accident Reconstruction Engineer holding a Ph.D., Dr. Frank
9 Perez, examine the area where the accident occurred. Plaintiff, herself, chose an area where she
10 remembers the accident occurring and pointed to a break in the concrete where a lip could be
11 said to have created a "hole". The Accident Reconstruction Engineer tested the area, using
12 people on the back of the golf cart at varying speeds, including top speed and at various angles.
13 He found that the lipped area of deteriorated concrete did not create any forces such that a
14 reasonable person would be "thrown off". There was no hazard or dangerous condition.

15 An inspection of the property took place and no hazard was found. There is, therefore,
16 no negligence on behalf of the United States as simply the owner of the land where the accident
17 occurred.

18 **IV. NO LIABILITY FOR PLAINTIFF'S NEGLIGENT GOLF CART USE**

19 Plaintiff claims that the United States was negligent in the accident because it failed to
20 train her to operate a golf cart. She requested to drive a cart and Ambros gave her one of the
21 carts for the intended purpose of taking supplies from the parking lot area to the VIP tent. She
22 had driven it throughout the day.

1 All of the carts on the day of the accident were specially altered to make them slow (as is
2 common with golf carts lent to the public). They all had signs permanently fixed inside the carts
3 to warn that passengers were to be in the seat only and to not operate the cart after drinking
4 alcohol. An Ambros employee specifically told her not to let people hang on to the back of the
5 cart and to limit passengers to two per cart. Also, she will testify, as she did at her deposition,
6 that she was a golfer and had previously driven a cart. Plaintiff will claim that she saw other
7 people hanging on the back and therefore the United States is responsible for her decision to put
8 her husband on the back. To the contrary, she failed to follow instructions to *not* allow
9 passengers to hang on to the back of the cart.

10 Further, Plaintiff claims that she was in no way negligent. She claims she drove slower
11 than the cart could go at full speed (which is still slow) and was not being reckless. If she admits
12 she was driving correctly (in a non-reckless manner), then training would have been irrelevant.
13 A "failure to train" was not the proximate cause of the accident. There must be some proof of a
14 causal connection between the alleged negligence of the United States and the harm to the
15 decedent. It is not enough to infer that the United States was negligent. Justice Cordozo stated it
16 best, "negligence in the air is not enough." Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 248
17 N.Y. 339 (1928).

18 Under the FTCA and under Guam's law of negligence, Plaintiff is not able to sustain her
19 burden of showing negligence on the part of a federal employee. The proximate cause of the
20 accident was, in fact, the decision by Plaintiff and her husband to drink to excess and hang on to
21 the back of a slow moving cart.

22 **V. PLAINTIFF HAS ADMITTED TO HER NEGLIGENCE IN THE LOWER**
23 **COURT**
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1 The instant case is not the only cause of action filed by the Plaintiff over the accident that
2 occurred on April 2, 2005. The Plaintiff in this case had earlier filed another Complaint in the
3 local court against a different defendant, Ambros, Inc., seeking money damages for the same
4 accident. Truong v. Aioi Insurance Co., (Case No. CV 1082-06, Superior Court of Guam) (Aioi
5 is the insurance company for Ambros) (hereinafter “Aioi”); See also Aioi, Complaint, attached
6 as Exhibit B. The Aioi case was filed by Ms. Truong in the Superior Court of Guam. To prove
7 negligence on the part of her employer, she has sought to show, in the lower court, that *she*,
8 herself, acted negligently, thus making the employer negligent on the theory of *respondeat*
9 *superior*. Aioi’s Motion, relying in part on the depositions in this federal case, has highlighted
10 Ms. Truong’s obvious conflict by alleging in her complaint that Ambros is liable to her on a
11 *respondeat superior* theory based on her own negligence, while simultaneously claiming in her
12 sworn depositions that she was not negligent. See Aioi, Motion For Summary Judgment,
13 (hereinafter the “Motion”) at page 3, attached as Exhibit C. On the *respondeat superior* theory,
14 the allegedly negligent employer, Ambros, was acting solely through its employee, Ms. Truong,
15 in the events that led to the unfortunate accident. Under Guam law, if Ms. Truong was not
16 negligent her *respondeat superior* tort claim against her employer fails as a matter of law.

17 Notwithstanding Ms. Truong’s denials in the sworn depositions, her attorneys have
18 argued, in the underlying case, that her negligent actions proximately caused her husband’s death
19 and therefore the employer is liable. See Aioi, Transcription of Guam Court Hearing Before the
20 Honorable Judge Arthur R. Barcinas, November 14, 2007, (hereinafter the “Transcript”), pages
21 16-20, attached as Exhibit D. At the hearing, *Plaintiff’s* attorney specified Plaintiff’s negligent
22 acts: she was drinking (while at work), she initially put six people on the golf cart after being
23 told not to, she placed people on the back of the cart, and drove on a bumpy road after it turned
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1 dark. In saying she was not negligent during the depositions, according to her attorney, she is just
2 trying to deny fault in her husband's death. Id. at page 19. As to the question of how the
3 Plaintiff could still say, in depositions, that she did nothing wrong, while at the same time claim
4 she was negligent while acting as an agent for Ambros, her attorney said, "I mean, what is she
5 going to say?" Id.

6 In her written Opposition to the Motion, Plaintiff states that, "After the concert ended,
7 Mr. Boudreau [the decedent] was invited to be transported to his vehicle by an Ambros/Shimbros
8 employee", referring, of course, to the wife (who is also the Plaintiff and the marketing manager
9 for Ambros). See Aioi, Plaintiff's Opposition to Defendant's Motion For Summary Judgment,
10 (hereinafter the "Opposition") at page 2, attached as Exhibit E. In the Opposition the Plaintiff
11 also states, "Ambros Marketing Manager was also a negligent party and the proximate cause of
12 the concert goer's death." Id. at page 10. Again, they are speaking of the Plaintiff, the Ambros
13 Marketing Manager, Ms. Truong.

14 Because the Plaintiff is a party to the other case and will have an opportunity to fully
15 adjudicate her claims of admitted negligence, collateral estoppel should ultimately apply to her
16 admissions if they prevail in that case. D'Ambra v. United States, 396 F. Supp. 1180 (D.R.I.
17 1973). The court in D'Ambra found that the defendant in that case was barred from re-litigating
18 on the issue of her negligence. The issue was identical to the one in the prior proceeding and she
19 had "enjoyed full opportunity to litigate these issues."

20 It would be a mockery to allow the Plaintiff to argue in that court that she was negligent
21 in the actions that lead to the accident, and then subsequently argue, in this Court, that she was
22 not negligent. She previously admitted causing her husband's death, now she wants to come to
23 Federal Court to deny it and blame the United States.

1 **VI. CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFF AND THE DECEASED**

2 Guam's law of "contributory negligence", applied as a modified comparative negligence,
3 18 G.C.A. § 90108, states that if the negligence of "any person or his legal representative" is "as
4 great as" the defendant's negligence, there can be no recovery. Plaintiff's negligence in the
5 events that led to the unfortunate accident is clearly paramount. She placed her inebriated
6 husband on the back of a golf cart that is not designed for people, consumed alcohol and drove
7 with more than two passengers. She then proceeded to drive the cart without regard to his safety.
8 In the parallel proceeding in the lower court, Plaintiff has argued that her own negligence was
9 the proximate cause.

10 Mr. Boudreau's decision to become severely drunk was an important proximate cause of
11 his death. See also Duenas v. Yama's Co., Inc., 1991 WL 255834 (D. Guam A.D.) (the Appellate
12 Division found that under Guam's "Contributory Negligence" law, plaintiff's intoxication of
13 .254 at the time of the accident barred his recovery in tort from the defendant).¹

14 Under Guam's substantive law, "Contributory negligence shall not bar recovery in an
15 action by any person or his legal representative to recover damages for negligence resulting in
16 death or injury to person or property, if such negligence was *not as great as* the negligence of the
17 person against whom recovery is sought." 18 G.C.A. § 90108. That is, if a plaintiff's negligence
18 is equal to or greater than the defendant's, there is no recovery under Guam law. Here,
19 Plaintiff's negligence was the major cause of Boudreau's death, and thus her negligence is at
20 least 50% (or "as great as" that of the defendant's), so therefore, there is no recovery under
21 Guam law. Additionally, Guam law requires that her negligence be added to that of her severely
22 inebriated husband's. That is far greater than 50%. This Court's application of Guam's law of

23 ¹ The Court interpolated the blood alcohol content at the time of the testing back to the time of the accident. In the
24 instant case, decedent's alcohol content at the time of testing was .2258. No effort was made to interpolate the BAC
25 back to the time he fell off the cart.

1 contributory negligence (which is actually a modified comparative negligence) results in no
2 possibility of recovery for the Plaintiff.

3 **VII. CONCLUSION**

4 The United States will present witnesses to show that it regularly inspected its grounds,
5 particularly before the concert on April 2, 2005, and that no hazards existed to its knowledge.
6 Witnesses will be presented who saw the decedent in an extremely intoxicated condition.
7 Evidence will show that Mr. Boudreau's Blood Alcohol Content was at least .2258 at the time of
8 the accident. Plaintiff was told not to place people on the back, hanging on to the moving cart.
9 The instructions permanently affixed to the cart clearly stated that the cart should not be driven
10 under the influence of alcohol. There was no negligent act or omission on the part of a federal
11 employee that proximately caused the accident. To the contrary, all negligent acts were
12 committed by the Plaintiff and Mr. Boudreau. An application of the laws of Guam, in the
13 manner required by the FTCA, will result in a finding of no liability on the part of the United
14 States for the unfortunate accident that caused the death of Plaintiff's husband.

15 RESPECTFULLY SUBMITTED: this 25TH day of August, 2008.

16 LEONARDO M. RAPADAS
17 United States Attorney
18 Districts of Guam and NMI

19 MIKEL W. SCHWAB
20 Assistant U.S. Attorney
21 JESSICA F. CRUZ
22 Assistant U.S. Attorney
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DISTRICT COURT OF GUAM
JULY 26 1990

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

JEANNE A. DENNIS, et al.,
Plaintiffs,
vs.
UNITED STATES OF AMERICA,
Defendant.

Civil Case No. 88-00042

MEMORANDUM OPINION

This matter was tried before the Court from July 23, 1990 to July 26, 1990. Now having considered all of the evidence and argument presented at trial, the Court issues the following memorandum opinion:

For the reasons discussed below, defendant's motion for dismissal pursuant to Fed. R. Civ. P. 41 is denied, and judgment is hereby rendered in favor of defendant United States of America, and plaintiffs shall take nothing by way of this action. Each side shall bear their own costs. Defendant shall prepare Findings of Fact and Conclusions of Law in accordance with Local Rule 260-3, and the Judgment in accordance with Local Rule 260-4. These documents shall be filed with the clerk of this Court no later than 9:00 a.m. on August 3, 1990.

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GOVERNMENT
EXHIBIT
A

I.

It is well established that a landowner has a duty to exercise ordinary care to keep its premises in reasonably safe condition. Here, the parties agree that the land on which Ms. Dennis was injured is owned by the United States.

Plaintiffs assert the United States breached its duty as a landowner in two respects. First, plaintiffs assert the United States was guilty of negligence at the time the pole at issue was removed in that the United States either improperly removed the pole or allowed the pole to be removed improperly. Second, plaintiffs assert that at the time of the accident the United States was on constructive notice that the hole existed and was dangerous.

II.

With respect to constructive notice, a landowner is on constructive notice of a dangerous condition on its land when the condition has existed for a period of time and would have been discovered by reasonable inspection of the land. 50 California Jurisprudence 3d, Premises Liability §§ 6,7 ("Lack of actual knowledge is no defense, if there was an opportunity to inspect, and inspection would have revealed the dangerous situation. ... But the possessor of property is not liable for an injury resulting from a defect that a reasonable inspection

1 would not have disclosed. ... The length of time that has
2 elapsed between the existence of a particular danger and an
3 accident caused by that danger has some bearing on the
4 determination of whether the possessor of the premises failed in
5 his duty to exercise reasonable care to discover the danger and
6 remove it."); Hogge v. United States, 354 F.Supp. 429, 432
7 (E.D.Va. 1972) ("In order to hold the owner of property liable
8 for injury sustained by an invitee due to the unsafe condition
9 of the premises, it must be shown that the ... unsafe condition
10 ... existed for such a length of time as to make it the owner's
11 duty in the exercise of ordinary care to have discovered it.").

12 Here, plaintiffs offered the following evidence. Mayor
13 Frank Portusach testified that the pole was removed in 1976
14 after being broken during typhoon Pamela, and that he stumbled
15 in the hole approximately one year later in 1977. Gabriella
16 Ficke testified that she fell in the hole while jogging by the
17 area sometime between 1983 and October of 1984. Mr. Sullivan
18 testified that although the hole in which Ms. Dennis fell was
19 concealed by grass and not visible, other holes existed inside
20 the Naval Hospital fence and were not concealed by grass but
21 rather were open and visible.

22 In response, the United States offered evidence that
23 the area in question was the subject of two types of
24 inspections, and that no holes were discovered during these
25 inspections. First, Jess Almoquera, a Quality Assurance
26 Evaluator for the Naval agency in charge of the Naval Hospital
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1 grounds, testified that part of his job was to periodically
2 drive by the area to make sure the grass was cut and to identify
3 any safety hazards. Mr. Almoguera authenticated documents which
4 established that he made several such drive-by inspections
5 shortly before Ms. Dennis' fall. Mr. Almoguera also testified
6 that the contractors who cut the grass were instructed to and
7 sometimes did identify safety hazards they came across while
8 mowing the grass. Plaintiffs also called Vince Santos, a
9 supervisor in the Facilities Management Department of the Naval
10 Hospital, who testified that the area in question was the
11 subject of an Annual Inspection consisting of either drive-by or
12 walk-by inspections, but that he did not participate in those
13 inspections. Mr. Santos also testified that the government
14 invited notification of safety hazards in this and other areas
15 by way of Form No. 5100/4, telephone calls, or in-person
16 reports. Mr. Almoguera and Mr. Santos both testified that no
17 holes were ever discovered or reported prior to Ms. Dennis'
18 fall.

19 The Court finds that the United States did not have
20 constructive notice of the hole for two reasons. First,
21 plaintiffs emphasize that the hole in which Ms. Dennis fell was
22 concealed by grass and not visible. Plaintiffs presumably make
23 this emphasis to avoid the defense that Ms. Dennis was
24 contributorily negligent. Such being the case, the Court finds
25 that the United States could not have discovered the hole upon
26 reasonable inspection. As stated in Hogge, supra at 433, which

1 involved a fall in a hole created by a decayed pier or bulkhead
2 piling, which hole was concealed by grass and not easily
3 discoverable, "Under the facts of this case the United States
4 was not negligent toward plaintiff. It neither knew of the
5 defect, nor with the requisite attentiveness could have
6 discovered it in time to save plaintiff from the accident and
7 injury. In this case, an opposite finding would convict
8 plaintiff of contributory negligence, which is a bar to his
9 right of recovery. If the United States was negligent in not
10 observing or locating the hole, then plaintiff likewise was.
11 [cite]. That is to say, if the hole was not covered by grass
12 but open and obvious, there would have been no duty to warn the
13 plaintiff of the existence of the condition." With respect to
14 the holes inside the Naval Hospital fence, no evidence was
15 submitted as to when, why or how the poles that created those
16 holes were removed. In addition, the Court finds that such
17 holes, like the hole in which Ms. Dennis fell, were concealed by
18 grass and could not have been discovered by the United States
19 upon reasonable inspection. Furthermore, even if holes inside
20 the fence could have been discovered, such would not lead to the
21 conclusion that the hole outside the fence should have been
22 discovered.

23 Second, the evidence shows that the United States did
24 conduct reasonable inspections of the land in question but did
25 not discover the holes and never received notice of the holes.
26 Although plaintiffs attempted to call into question whether Mr.

1 Almoquera inspected for safety hazards or merely for whether the
2 grass was mowed properly, the Court finds that the preponderance
3 of the evidence shows that Mr. Almoquera inspected inter alia
4 for safety hazards. Similarly, although plaintiffs attempted to
5 call into question the function and method of the Annual
6 Inspection about which Mr. Santos testified, the Court finds
7 that the preponderance of the evidence shows that the Annual
8 Inspections were intended and designed to identify safety
9 hazards. Such inspections satisfy the United States' duty as a
10 landowner.

11 12 III.

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14 Plaintiffs' alternate theory of liability is that the
15 United States is guilty of negligence in that it either
16 improperly removed the pole at issue or allowed the pole to be
17 removed improperly.

18 The evidence at trial was inconclusive as to who
19 removed the pole, i.e. whether the pole was removed by the
20 government of Guam, the United States, both, or some other
21 entity. However, plaintiff established other pertinent facts.
22 Joe Manibusan, who has been employed by the Public Utility
23 Agency of Guam and/or the Guam Power Authority since the late
24 1950s, testified that the pole at issue was in place since at
25 least the late 1950s or early 1960s. Mayor Frank Portusach
26 testified that the pole was broken when a tree fell on it during
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1 typhoon Pamela in 1976, and removed shortly thereafter. As
2 stated above, it is not clear who removed the pole; it is clear,
3 however, that the pole was removed by cutting it off at ground
4 level and leaving the remainder in the ground. George Wusstig,
5 a former employee of the Public Utility Authority of Guam and of
6 Pacific Gas & Electric in California and a current employee of
7 the Guam Power Authority, testified that the proper manner in
8 which to remove a pole is to remove the entire pole, including
9 the portion in the ground, and fill the hole with dirt and/or
10 gravel, but not to merely cut the pole off at ground level.
11 Plaintiffs' exhibit 51, entitled "Restoration and Hardening of
12 Guam's Military Telephone and Electric Power Systems, Naval and
13 Air Force Facilities, Guam, M.I.," which sets forth certain
14 military specifications and requirements with respect to work
15 that was to be performed for the military by contractors (which
16 work was unrelated to the instant action), provides in paragraph
17 2.3, "Poles: Poles indicated to be removed shall be removed
18 completely including that portion below grade. The Contractor
19 will not be allowed to cut poles off at ground level."

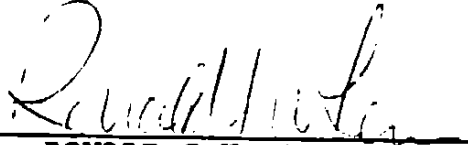
20 Plaintiffs argue that the United States was negligent
21 in that it either removed the pole at issue improperly or
22 allowed the pole to be removed improperly. Plaintiffs argue
23 that the pole was on the United States' land since at least the
24 late 1950s, and that since the pole was on the United States'
25 land for at least approximately 20 years and was suddenly
26 removed in 1976, the United States should have ascertained that

1 the pole was removed properly.

2 For the reasons discussed in section II above, this
3 argument is without merit. The pole was removed at ground
4 level; no stump was protruding above the ground. Such being the
5 case, the fact that the pole was not removed completely could
6 not have been discovered by reasonable inspection. Indeed, the
7 United States did conduct reasonable inspections of the area in
8 question and did not discover this fact. To hold the United
9 States liable for failing to ascertain that the pole was removed
10 properly in this case would be akin to holding the United States
11 strictly liable for injuries occurring on its land. Such a
12 strict liability theory is not permitted by the Federal Torts
13 Claims Act. Accordingly, the Court finds that the United States
14 was not negligent in failing to ascertain whether the pole at
15 issue was removed in a proper manner.

16
17 IT IS SO ORDERED.

18
19 DATED: July 31, 1990.

20
21
22 
23 **RONALD S.W. LEW**
24 United States District Judge
25
26
27
28

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CLERK OF COURT

BY _____

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*Attorneys for the Estate of Roland
Anthony Boudreau, Deceased*

IN THE SUPERIOR COURT OF GUAM

CV 1082-06

CASSANDRA CHAU TRUONG,
Administratrix of the Estate of
ROLAND ANTHONY BOUDREAU,
deceased,

Plaintiff,

vs.

AIOI INSURANCE COMPANY, LTD.,

Defendant.

CIVIL CASE NO. CV

**COMPLAINT FOR DAMAGES
FOR WRONGFUL DEATH**

1. This Court has jurisdiction of this action pursuant to 7 G.C.A. § 3105, *et seq.*
2. Plaintiff is the duly appointed, qualified and acting Personal Representative of the *Estate of Roland Anthony Boudreau, Deceased*, having been appointed by the Superior Court of Guam in Probate Case No. PR0151-05.
3. Plaintiff brings this action as specified in § 377 of the Guam Code of Civil Procedure (now codified at 7 G.C.A. § 12109) on behalf of the surviving heirs of Roland Anthony Boudreau, deceased (hereinafter referred to as the "Decedent").

GOVERNMENT
EXHIBIT

B

1 4. The only heirs at law of the Decedent, and their relationships to the Decedent,
2 are as follows:

3 a. Cassandra Chau Truong, spouse; and

4 b. Joshua Boudreau Chapman, son

5 5. At all times herein mentioned, there was in effect a policy of insurance, by
6 the terms of which Defendant AIOI Insurance Company, Ltd. agreed to pay any loss by reason of
7 liability imposed on Ambros, Inc., d.b.a. Shimbros Productions ("Shimbros"), for damages because
8 of injuries to any persons as a result of any negligence by Shimbros, with respect to all damages,
9 including damages for care and loss of service arising out of bodily injury, including death at any
10 time resulting therefrom sustained by one or more persons, which may occur to any person during
11 attendance at concerts sponsored by Shimbros. Plaintiff brings this action against Defendant
12 pursuant to Guam's direct action statute, 22 G.C.A. § 18305.

13 6. On or about April 2, 2005, the Decedent attended a *Three Doors Down*
14 concert at *Polaris Point* in Guam, which concert was sponsored by Shimbros.

15 7. The Decedent was an invited guest of the VIP tour marketed by Shimbros,
16 which began at the *Hard Rock Café* in Guam..

17 8. Shimbros provided Decedent VIP bus transportation from the pre-concert
18 party at the *Hard Rock Café* Guam down to *Polaris Point*.

19 9. Shimbros utilized golf carts to transport the VIP guests around the *Polaris*
20 *Point* premises.

21 10. At about 7:00 o'clock p.m. on April 2, 2005, one of the employees of
22 Shimbros was transporting Decedent and another employee of Shimbros in a golf cart to Decedent's
23 car located at *Polaris Point* so that he could drive home. The Decedent was standing on the rear part

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1 of the golf cart where golf bags are ordinarily carried.

2 11. During the transportation of the Decedent, the golf cart hit a bump at *Polaris*
3 *Point*, which caused the Decedent to fall from the golf cart, where he violently struck his head on
4 the pavement and was severely injured.

5 12. The Decedent was taken to the U.S. Naval Hospital on Guam on the same day
6 but died one day later, on April 3, 2005 from the injuries received from said accident.

7 13. Shimbros, and its agents and employees, negligently and carelessly allowed
8 its employees to operate said golf carts without proper instructions and negligently operated the golf
9 cart, thereby causing the Decedent to fall from the golf cart and, thereby proximately causing the
10 Decedent's death.

11 14. As a direct and proximate result of said negligence, and the injuries caused
12 thereby, Roland Anthony Boudreau died.

13 15. Immediately prior to his death, the Decedent was thirty-six (36) years old, was
14 married to Cassandra Chau Truong, and had one minor child and had a life expectancy of forty-one
15 (41) more years. The Decedent was a faithful and dutiful husband to his wife, and was a dutiful
16 father to his only child, Joshua Boudreau Chapman.

17 16. As a proximate result of the negligence of Shimbros Productions, and its
18 agents, employees and servants, and the death of said Decedent, the Decedent's wife and son have
19 been deprived of the consortium, society, comfort, protection, services and support, parental advice,
20 care, education and guidance of the Decedent, all to their damage in the sum of One Million Dollars
21 (\$1,000,000).

22 ///

23 ///

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1 WHEREFORE, Plaintiff prays for judgment as follows:

- 2 1. For damages in the sum of One Million Dollars (\$1,000,000);
- 3 2. For attorney's fees;
- 4 3. For costs of suit herein incurred; and
- 5 4. For such other and further relief as the Court may deem proper.

6 DATED at Hagåtña, Guam, on August 29, 2006.

7 TEKER TORRES & TEKER, P.C.

8 
9 By LAWRENCE J. TEKER, ESQ., Attorneys for
10 the Estate of Roland Anthony Boudreau, Deceased

11 **DEMAND FOR JURY TRIAL**

12 PLEASE TAKE NOTICE that Plaintiff demands a trial by jury of twelve (12) persons
13 in this action.

14 DATED at Hagåtña, Guam, on August 29, 2006.

15 TEKER TORRES & TEKER, P.C.

16 
17 By LAWRENCE J. TEKER, ESQ., Attorneys for
18 the Estate of Roland Anthony Boudreau, Deceased

19 LJ:cs

20 PLDGS:TRUONG, CASSANDRA-INSURANCE:001

21
22
23
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